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In the Supreme Court of the United States

OCTOBER TERM, 1982

FRANK LUJAN, PETITIONER

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR
JAMES G. WATT, SECRETARY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE UNITED STATES DISTRICT COURT DENIED PETITIONER DUE PROCESS OF LAW BY REFUSING JURISDICTION PURSUANT TO 28 U.S.C. §1331(a).

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In the Supreme Court of the United States

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FRANK LUJAN, PETITIONER

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UNITED STATES DEPARTMENT OF THE INTERIOR
JAMES G. WATT, SECRETARY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Frank Lujan, by and through his attorney, William A. L'Esperance, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit affirming the lower court dismissal of his complaint in the District Court for the District of New Mexico. The Bureau of Land Management wrongfully applied its own regulations and procedures to a "dependent resurvey" of certain land affecting the rights of Petitioner in violation of 43 U.S.C. §§752 and 772.

OPINION BELOW

The slip opinion of the United States Court of Appeals for the Tenth Circuit, filed March 29, 1982, affirming the Memorandum opinion of the District Court for the District of New Mexico dismissing the complaint of Petitioner, is set forth herein as Appendix A.

EXTENSION OF TIME

Justice White by letter order, No. A1098, 19 June, 1982, extended the time for filing this Petition until July 27, 1982.

JURISDICTION

The Opinion and Order appealed from was filed March 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On June 2, 1970, the New Mexico Director of the Bureau of Land Management directed a "dependent resurvey" of certain lands, including portions of Petitioner's lands, pursuant to 43 U.S.C. §§752 and 772, and the Manual of Surveying Instructions, 1947 (hereinafter, the Manual).

The resurvey, conducted in the summer of 1970, changed the accepted boundary of Petitioner's land and he protested. The Interior Board of Land Appeals granted Petitioner a hearing but required Petitioner to demonstrate the incorrectness of the resurvey. 30 IBLA 95 (1977).

The rehearing found the resurvey to be in sufficient compliance with the Manual and IBLA hearing precedent. 40 IBLA 186 (1979). It is from this decision that Petitioner complained in United States District Court for the District of New Mexico.

The government moved to dismiss the complaint and the District Court, viewing this matter as a mere boundary dispute, despite the pleading of 28 U.S.C. §1331, dismissed for want of a federal question.

The Court of Appeals for the Tenth Circuit affirmed on different grounds, citing equitable estoppel, similarly viewing the situation as a mere boundary dispute.

Petitioner herein argues that the District Court had jurisdiction under 28 U.S.C. §1331 to review the Bureau of Land Management's application of 43 U.S.C. §§752 and 772, as well as its own procedure; that the matter is significant and far reaching, and has nothing to do with equitable estoppel; and that a fundamental procedural due process issue exists regarding Petitioner's severe burden of proof as misapplied by the governmental agency in question.

REASONS FOR GRANTING THE WRIT

There are two big things wrong with the decision below (see Appendix A) — (1) the Tenth Circuit is out of line with all other jurisdictions on its interpretation of 28 U.S.C. §1331 and (2) the Bureau of Land Management (BLM) has never had a serious review of its erroneous extrapolation of an internal 1903 dicta-principle regarding burden of proof.

Mr. Lujan has had family patent rights to the area in question since 1880. His amended complaint seeks review of the administrative decision in 40 IBLA 186 (1979) pursuant, among other things, to 28 U.S.C. §1331. He alleges that as a direct and proximate result of BLM's decision making process, he has suffered and continues to suffer real damages to his property rights as secured by the Constitution and Laws of the United States of America.

The District Court opinion begs the federal review question by stating that the resurvey was conducted pursuant to the Manual. How does it know this absent a hearing? The Court went on to cite *Califano v. Sanders*, 430 U.S. 99, 51 L.Ed.2d 192, 97 S.Ct. 980 (1977), to the effect that the Administrative Procedures Act alone does not grant subject matter jurisdiction. The Court avoided or never found *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 56 L.Ed.2d 570, 98 S.Ct. 2002 (1978), which was clearly pled and argued by Petitioner to both the District Court and the Court of Appeals.

The Court of Appeals avoided this jurisdictional question by bringing in collateral estoppel. But the situation here is not, as the government suggested to Denver, a boundary dispute, but is a serious petition for review of an agency's interpretation of its own rules and regulations. The Petitioner has exhausted his administrative remedies and now seeks timely review of the agency's acts, particularly whether the BLM followed proper procedure on whether the resurvey should be rejected.

Jurisdiction to review a decision of the BLM is clearly conferred by 28 U.S.C. §1331(a). *Andrus v. Charlestone Stone Prod. Co.*, supra.

There are no published Tenth Circuit cases on point. This Court has followed *Charlestone Stone Products* in *Duke Power Co. v. Caroline Env. Study Gp.*, 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1979).

Three other Circuits contain cases diametrically opposed to the decision on jurisdiction to review below:

NINTH:

Doria Mining and Eng. Corp. v. Morton, 608 F.2d 1255 (9th Cir. 1979).

Baker v. United States, 613 F.2d 224 (9th Cir. 1980) cert. den. 449 U.S. 932, 66 L.Ed.2d 157, 101 S.Ct. 332 (1980).

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Mir v. Fosburg, 646 F.2d 342 (9th Cir. 1980).

Laden v. Andrus, 595 F.2d 482 (9th Cir. 1979).

FIFTH:

Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132 (5th Cir. 1980).

Gorman v. Army and Air Force Exchange Service, 619 F.2d 1141 (5th Cir. 1980).

SEVENTH:

Parkview Corp. v. Dept. of Army, Etc., 490 F. Supp. 1278 (E.D. Wis. 1980).

Pursuant to Rule 17(a) and (c), Rules of the Supreme Court of the United States, the Writ should issue and briefs ought to be submitted. The above conflict in 28 U.S.C. §1331(a) is the principal reason — the Tenth Circuit has attempted herein to avoid following *Charlestone Stone Products* and the reasoning

of all the other courts which have confronted this issue.

Not only is this case in open conflict with the reasoning of this Court and several other jurisdictions, but also the Tenth Circuit has failed to review an agency which is engaged in a pattern of frustrating procedural due process. (Rule 17(c), Rules of the Supreme Court).

The BLM is permitted by 43 U.S.C. §§752 and 772 to conduct resurveys where public land is invvolved — Petitioner assumes the validity of the purpose of the resurvey in question; it really makes no difference if the BLM simply resurveys, it is the "retracement and restoration" of markers which has led to difficulties. These statutes require the agency not to execute the resurvey so as to impair any rights of owners of lands affected, as here, by any such resurvey. (A "dependent" resurvey may not survey anew, but is limited in its function to retracement of the old patent survey. Manual §§409-427, see especially §419).

The flavor of the Manual and the statutes, above, is that when, as here, the agency resurveys public lands, the question is not where would an entirely accurate survey locate the lines, but where *did* the *original* survey locate lines. See *Trustees v. Toffel*, 145 So. 2d 737 (Fla. App. 1962), and *Ben Realty v. Gothberg*, 56 Wyo. 294, 109 P.2d 455 (1941). Jurisdiction, therefore, lies with the federal court precisely because a new resurvey was made, the results were *ultra vires* and damaging to Petitioner, and the statutes and regulations in the Manual were violated.

After the government issued a valid patent in 1880 and *that* survey accurately disposed of the land that has since belonged to Petitioner's family, the government had no jurisdiction to affect Lujan's rights by "restoration" in a new survey. 43 U.S.C. §752. A "dependent resurvey", as opposed to an "independent resurvey", follows the footsteps of the original surveyors and it is *immaterial* whether the lines run by him are correct. *Galt v. Willingham*, 11 F.2d 757 (C.C.A.Fla. 1926); *Vaught v. McCly-*

mond, 116 Mont. 542, 155 P.2d 612 (1945); see *Spawr v. Johnson*, 49 Kans. 788, 31 P.664 (1892).

The issue is not where the boundary is — what is agreed *is* the boundary— but rather whether the 1970 BLM dependent resurvey should be accepted as the official record of survey or rejected.

The BLM ought not to be allowed without review to tell patent-holders where their land is — the BLM thereby gives adjacent landholders a cause of action by interfering in an established patent!

The reason why Petitioner could not adequately demonstrate this misapplication of the statutes and regulations, above, through the administrative hearing process, and the substantive reason why the Writ should issue, is that Petitioner has been required since 30 IBLA 95 (1977) to refute the 1970 resurvey by *clear and convincing* evidence. Humpty-Dumpty has been turned on his head and the patent-holder, whose land has been resurveyed out from under him, has been shackled with the procedurally unfair burden of showing that he can rebut a powerful presumption of correctness attached to the BLM's resurvey by age, rather than by law or judicial interpretation. The fox has been left to guard the chickens.

The statute says that the government should start from where things *are*, on the ground, and not make lines and move 90 years of accepted patent ownership. 43 U.S.C. §§752, 772. Manual, supra, §409.

The presumption of government survey correctness leading to Petitioner's excessive burden of proof appears in no statute or regulation. It is a creature of internal IBLA adjudication. See *Henry Woodruff*, 24 IBLA 190 (1976) and *Nine R.B. Levinson*, 1 IBLA 252, 256 (1971). The source appears to be a misinterpretation of *George Whitaker*, 32 L.D. 329 (1903), where a

survey was *approved* and *after a long time* it appeared some land had been omitted from the survey. It made sense, in that contest, to require a higher standard of proof for a petitioner.

But here the 1970 survey has never been *accepted*! So, even accepting the sense of the agency's presumption, its rule does not apply and in the instant case the *government* ought to be required to prove it followed its own statutes and regulations. Needless to say, Petitioner provided a substantial amount of proof to this effect in the 1979 hearing, and plenty of doubt about the 1970 resurvey was raised — only the wrongful and excessive burden of proof prevented Mr. Lujan from winning below.

The BLM ought to bear the burden of showing the gross inaccuracy of the original 1880 survey, not the other way around. The agency has never demonstrated that the 1880 plat is fraudulent or grossly in error. The government should not be allowed to conduct a patently erroneous resurvey, which result in a neighbor gleefully filing an ejectment action, then wash its hands of the matter by imposing an outrageous standard of proof upon the patent-holder.

CONCLUSION

The BLM resurveyed Petitioner Frank Lujan's land, the resurvey was never accepted, the IBLA required Petitioner to meet a clear and convincing evidence standard which is an erroneous application of an internal 1903 decision, the BLM did not follow 43 U.S.C. §§752 and 772 or its own Manual, the District Court declined jurisdiction to review the IBLA by misreading this case as a boundary dispute and failing to apply 28 U.S.C. §1331 to Petitioner's Constitutional right to procedural due process. The Tenth Circuit perpetuated the misreading by failing to see this as a matter of agency review

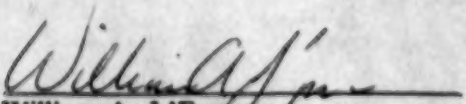
and failing to apply 28 U.S.C. §1331.

The difficulty throughout this case has been caused by the misapplication of the burden of proof. This Court is urged to grant its Writ to

(1) put the Tenth Circuit in line with *all* other 28 U.S.C. §1331 decisions, and

(2) to change the burden of going forward with the evidence to the BLM and remand this cause to the District Court for a review of whether the BLM should be prohibited from accepting the 1970 resurvey.

Respectfully submitted



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